Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Ameritech Operating Companies	)	
Tariff FCC No.2	)	
Transmittal No. 1312	)	
	)	
Nevada Bell Telephone Companies	)	
Tariff FCC No.1	)	
Transmittal No. 20	)	
	)	
Pacific Bell Telephone Company	)	WC Docket No. 02-319
Tariff FCC No.1	)	
Transmittal No. 77	)	
	)	
Southern New England Telephone Companies	)	
Tariff FCC No.39	)	
Transmittal No. 1772	)	
	)	
Southwestern Bell Telephone Company	)	
Tariff FCC No.73	)	
Transmittal No. 2906	)	

OPPOSITION TO DIRECT CASE

The Official Committee ("Committee") of Unsecured Creditors of WorldCom, Inc. ("WorldCom"), et al., by its attorneys, respectfully submits this opposition ("Opposition") to the direct case ("Direct Case") filed by SBC Communications Inc. on behalf of its above-referenced operating companies (collectively, "SBC") in support of SBC's proposed tariff revisions. These revisions have been suspended and designated for investigation by the Pricing Policy Division ("Division") of the Federal Communications

Commission ("Commission") Wireline Competition Bureau ("Bureau") in the above-referenced proceeding.[1]

The Committee is an interested party in this proceeding. The Committee is a statutorily created committee appointed by the Office of the United States Trustee in connection with WorldCom's pending bankruptcy cases and charged with a fiduciary duty to all unsecured creditors of WorldCom. In general, the unsecured creditors' ability to receive value on the substantial debt they are owed by WorldCom is largely affected by WorldCom's post-bankruptcy value as a going concern, which is, in part, dependent on the amount of WorldCom's cash flow upon its emergence from bankruptcy. Therefore, the Committee and its constituency are significantly affected by the Division's actions in the instant proceeding, because enactment of SBC's proposed tariff revisions could result in SBC requiring WorldCom to pay security deposits so substantial, either while in bankruptcy or upon its emergence from bankruptcy, that WorldCom's available cash flow and ability to operate profitably as a going concern would significantly decrease.

The Committee believes that WorldCom and other SBC carrier and end-user customers are best suited to respond to the individual arguments raised in SBC's Direct Case. However, as a general matter, the Committee urges the Division to find that SBC's proposed revisions are unjust, unreasonable, and discriminatory under Sections 201 and 202 of the Communications Act (the "Act") of 1934, as amended.[2] If SBC's proposed

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[1] Ameritech Operating Companies Tariff FCC No. 2, Transmittal No. 1313 et al, WC Docket No. 02-319 (rel. Oct. 10, 2002) ("Designation Order").

[2] 47 U.S.C. §§ 201, 202. Section 201 provides that "all charges, practices, classifications, and regulations for and in connection with [a] communication service shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is . . . unlawful." Section 202 provides that it is "unlawful for any common carrier to make any unjust or unreasonable discrimination in

revisions are permitted to take effect, SBC will have the right to require security deposits equivalent to two month's billings from customers who have a history of late payments or who are unable to demonstrate established credit, or one month's billings from its largest customers if SBC should decree that they have "impaired creditworthiness," as demonstrated by one of five broad criteria, including filing for bankruptcy. Because SBC is a dominant, incumbent carrier and its interstate access customers have no choice of provider other than SBC to reach SBC end users, absent regulatory intervention, such customers will be forced to accept SBC's burdensome security deposit provisions. This result is unjust and unreasonable under Section 201 because it unfairly penalizes SBC's interstate access customers. In addition, because SBC's carrier customers also are, in large part, SBC's competitors, SBC's application of its proposed tariff revisions likely will be discriminatory under Section 202. The Committee thus urges the Division to reject wholly SBC's proposed tariff revisions.

At a minimum, the Committee requests that the Division find SBC's proposed tariff revisions to be unlawful to the extent they apply to any customer that is subject to a pending bankruptcy proceeding ("Debtor Customer"). Specifically, the Division should require SBC to revise its tariffs to eliminate bankruptcy as a criterion for determining whether a security deposit is required. Due to WorldCom's current status as a Debtor Customer of SBC, this issue is the primary focus of the Committee's Opposition.

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charges, practices, classifications, regulations, facilities, or services for or in connection with [a] communication service."

I. THE PROPOSED TARIFF REVISIONS REGARDING SECURITY DEPOSITS ARE UNJUSTIFIED BY THE CURRENT STATE OF THE TELECOMMUNICATIONS INDUSTRY AND SHOULD BE REJECTED AS UNJUST, UNREASONABLE, AND DISCRIMINATORY

SBC asserts that its proposed revisions are warranted due to the "state of crisis" in the telecommunications industry.[3] Specifically, SBC argues that the growth of competition in the telecommunications sector has created a cadre of "underperforming companies" against which SBC must protect itself from bad customer debt.[4] Although the Committee agrees that risk and uncertainty in the telecommunications market have increased in recent years, SBC's proposed tariff revisions reflect not the actions of a competitor in an open market, but instead the actions of a dominant, incumbent carrier attempting to insulate itself from all risk of default by its customers by unfairly exercising its market power. SBC has proposed revisions to its tariffs that are unjust, unreasonable, and discriminatory under the Act and established Commission precedent.

The proposed revisions are unjust and unreasonable because they would allow SBC to require its largest customers, even those with a lengthy history of full and timely payment, to assume virtually all of SBC's credit risk. SBC has argued that leaving the security deposit provisions of its existing tariffs in place will force it to assume the market risk of underperforming companies.[5] Therefore, according to SBC, new practices are warranted that will protect SBC from any risk of uncollectibles. It is reasonable to conclude that a carrier that has a lengthy history of full and timely payment is not a significant risk for non-payment. Nevertheless, SBC, in an attempt to capitalize on fears stemming from the current state of the telecommunications industry, and its desire to

[3] Direct Case at 7.

[4] Direct Case at 18.

[5] Direct Case at 2.

eliminate as much of its competition as possible, has proposed tariff revisions that will cause its largest customers, including carriers that have never missed a payment, to unfairly assume all of the risk of default in the interstate access market.[6]

SBC's interstate access customers cannot seek an alternative provider if they find SBC's security deposit policy to be overly burdensome. In the interstate access service market, a customer seeking to access SBC end users must use and pay for SBC interstate access service. As a consequence, absent regulatory intervention, such customer also must accept SBC's security deposit policy and pay security deposits to the extent SBC requires. For a customer that has always made, and continues to make, full and timely payment, but is deemed to have impaired creditworthiness under the SBC criteria, this could mean required payment of up to one month's billings. This result clearly is unjust and unreasonable because it is highly likely to "place undue burdens on customers" by requiring substantial payments in excess of payments actually due for services rendered.[7] Such payments would be a particularly high burden in today's telecommunications market.

The proposed tariff revisions also have the potential to be discriminatory. Given the depressed state of the telecommunications industry, many of SBC's customers or their parent companies are likely to have senior debt securities that are rated below investment grade. Under the proposed tariff revisions, SBC could demand security

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[6] Indeed, SBC's $1 million billing threshold would effectively grant SBC a license to target and financially damage its largest and most dangerous competitors while maintaining the façade of competition in the local exchange market. While abusing its market power by imposing deposit requirements on its larger customers, SBC would be able to argue that competition continues to thrive due to the presence of smaller carriers who are able to avoid such requirements. Of course, if any of the smaller carriers were to compete so effectively as to reach the $1 million threshold, they too would become a target.

[7] Annual 1987 Access Tariff Filings, Memorandum Opinion and Order, 2 FCC Rcd 280, 304-305 (1986).

deposits or advance payments from these customers. Because many of SBC's interstate access customers are also its competitors, the proposed tariff revisions will afford SBC the opportunity to discriminate against and thereby disadvantage its competitors. Such result is unwarranted by the state of the telecommunications industry and violates Section 202. The effects of such discrimination are exacerbated by the negative impact deposit requirements would have on the balance sheets of competitors, which would make SBC's competitors less attractive to investors. Implementation of SBC's proposed tariff revisions therefore will enable SBC to hinder both the short-term cash flow and long-term viability of its competitor customers virtually at will.

In sum, the Division should reject SBC's proposed tariff revisions and not allow SBC an opportunity to exert its market power to unfairly insulate itself from any risk of default and hinder its competitors' growth.

II. SBC'S PROPOSED TARIFF REVISIONS REGARDING SECURITY DEPOSITS ARE UNLAWFUL AS APPLIED TO DEBTOR CUSTOMERS

If the Division does not summarily reject all of SBC's proposed tariff revisions, at a minimum, the Committee urges the Division to find that SBC's proposed tariff revisions violate the Bankruptcy Code ("Code") and thus are unlawful as applied to any Debtor Customer. SBC's proposal to use bankruptcy as a trigger for requiring a security deposit represents, at best, a fundamental misunderstanding of the nature and purpose of the Code, and at worst, a calculated attempt to undermine the Code and the bankruptcy court's authority in order to unfairly shift SBC's normal business risks to its competition. The Commission should reject SBC's proposed tariff revisions to prevent an end run

around the bankruptcy process, and the damage to SBC's Debtor Customers that would surely follow.

A. Bankruptcy is Not a Valid Predictor of the Likelihood of Whether a Customer Will Pay its Utility Bills in the Future

SBC has argued that it should be allowed to demand a security deposit from a Debtor Customer because recent bankruptcies have "increased the level of carriers' uncollectibles by astounding proportions,"[8] and has implied that bankruptcy is a black hole from which SBC never receives payment for services rendered.[9] To the contrary, companies enter bankruptcy in part to ensure that they will be able to pay debts as they become due, under the direction and supervision of the bankruptcy court. In particular, with respect to utilities such as SBC, the Code recognizes that a debtor generally may be able to provide "adequate assurance" that it can continue to make payments for utility services.[10] Only if a debtor fails to provide adequate assurance of payment, as determined by the bankruptcy court, is a utility permitted to discontinue service to the debtor. The fact that filing for bankruptcy is not in itself a valid predictor of a customer's ability to pay its bills in the future is proven by the WorldCom bankruptcy, one of the cases cited by SBC as a justification for the proposed tariff revisions.[11] Specifically, upon information and belief, WorldCom, which filed for bankruptcy protection under

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[8] Direct Case at 5.

[9] SBC paints a dismal picture of its recovery from customers in bankruptcy, but it is both specious and irrelevant. First, the Direct Case at no point addresses the amounts received from customers for services rendered during the course of bankruptcy proceedings. SBC's rate of recovery on pre-petition receivables has absolutely no bearing on the ability of a company in bankruptcy to meet its ongoing post-petition obligations. Second, SBC's 8.29% recovery figure appears to have been driven down by the inclusion of very recent bankruptcies which have not yet reached the stage at which SBC will receive payment for pre-petition defaults. See Direct Case at 15.

[10] 11 U.S.C. § 366.

[11] Direct Case at 5.

chapter 11 on July 21, 2002, is current with its post-petition payments to SBC.[12] In sum, bankruptcy is not and cannot be considered a valid predictor of a customer's ability to pay. Therefore, the Division should not allow SBC to use bankruptcy as a trigger to require payments of security deposits, and should require SBC to remove bankruptcy as a criterion for evaluating whether a customer's creditworthiness has been impaired.

B. The Proposed Tariff Revisions Usurp the Bankruptcy Court's Exclusive Authority by Allowing SBC to Unilaterally Impose a Deposit Requirement on Debtors

In addition to drawing on invalid predictors with respect to future payments, SBC's proposed tariff revisions constitute an inappropriate end run around the Code. First, application of SBC's proposed security deposit provisions against a Debtor Customer would conflict with the jurisdiction of the bankruptcy court, which has the sole discretion to determine what constitutes adequate assurance of payment and to modify what amount of the deposit or security, if any, is required to provide such adequate assurance.[13] Any tariff that claims to apply to chapter 11 debtors is unlawful because "section 366(b) [of the Code] vests in the bankruptcy court the exclusive responsibility for determining the appropriate security which a debtor must provide to his utilities to preclude termination of service."[14] Implementation of SBC's proposed tariff revisions, which would give SBC the right to determine unilaterally whether a Debtor Customer could make future payments, would allow SBC to usurp the bankruptcy court's authority.

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[12] Irrespective of any pre-petition amounts that may be owed by WorldCom to SBC, which are now subject to the jurisdiction of the bankruptcy court, WorldCom's timely payment of post-petition debt underscores that the bankruptcy process and the supervision of the bankruptcy court may increase, rather than decrease, the likelihood that a carrier will make future payments.

[13] 11 U.S.C. § 366.

[14] Begley v. Philadelphia Elec. Co. (In re Begley), 41 B.R. 402, 405-406 (E.D. Pa. 1984), aff'd, 760 F.2d 46 (3d Cir. 1985) (emphasis added).

This result would harm both the integrity of the bankruptcy process and the Debtor Customer. It is the role of the bankruptcy court, and not SBC, to determine what type of adequate assurance is best in a given case.

Second, imposition of security deposits against a customer that is the subject of a bankruptcy proceeding is unnecessary, as SBC already would be protected as a utility in a bankruptcy proceeding. Specifically, Section 366 of the Bankruptcy Code ensures that SBC will not be subject to an unreasonable risk of nonpayment for services provided to a debtor, notwithstanding SBC's assertions to the contrary.[15] The requirement of adequate assurance of payment contained in Section 366 does not require payment of a deposit, but simply means that the utility should not be subject to an unreasonable risk of nonpayment for services rendered to a debtor after the commencement of the bankruptcy case.[16] Adequate assurance is not the equivalent of a guaranty of payment, which is exactly what SBC proposes to demand in the form of a security deposit.[17] Indeed, whether a utility is subject to an unreasonable risk of nonpayment can only be determined by examining the totality of the circumstances and making a "particularized inquiry into the postpetition economics of a debtor's chapter 11 case."[18] As noted in Caldor,

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[15] See Direct Case at 15.

[16] See Virginia Elec. & Power Co. v. Caldor, Inc., 117 F.3d 646 (2d Cir. 1997), aff'g 199 B.R. 1, 3 (S.D.N.Y. 1996); In re Adelphia Business Solutions, Inc., 280 B.R. 63, 80 (S.D.N.Y. 2002). Although Verizon's proposed tariff revisions offers the "option" of prepayment in lieu of a cash security deposit, the availability of this option is highly questionable with respect to a Debtor Customer. Prepayment would be particularly burdensome to an entity attempting to reorganize under bankruptcy protection.

[17] See Caldor, 199 B.R. at 3 ("The statute does not require an 'absolute guaranty of payment.'"); Adelphia Business Solutions, 280 B.R. at 80 ("[A] bankruptcy court is not required to give a utility company the equivalent of a guaranty of payment."); In re Global Crossing Ltd., et al., Nos. 02-40187 through 02-40241, slip op. (Bankr. S.D.N.Y. March 15, 2002) (REG).

[18] See In re Adelphia Business Solutions, Inc., et al., Ch. 11 Case No. 02-11389, slip op. at 32 (Bankr. S.D.N.Y. 2002).

> In deciding what constitutes "adequate assurance" in a given case, a bankruptcy court must "focus upon the need of the utility for assurance, and to require that the debtor supply *no more than that*, since the debtor almost perforce has a conflicting need to conserve scarce financial resources. Accordingly, 'bankruptcy courts must be afforded reasonable discretion in determining what constitutes 'adequate assurance' of payment for continuing utility services.'[19]

It is not unusual for a bankruptcy court, after considering the particulars of a debtor's chapter 11 case, to determine that utilities are adequately assured of payment for future services without any deposits because, among other reasons, (i) the debtor's post-petition financing arrangements provide sufficient liquidity, (ii) utilities have a greater ability to monitor the financial strength of a debtor due to, among other things, the monthly operating reports a debtor is required to file, and (iii) all services provided by a utility to a debtor are entitled to administrative expense priority status pursuant to section 503(b) of the Code.[20] The proposed tariff revisions, if enacted, would override the Code and the bankruptcy court's authority by mandating exorbitant deposits in every chapter 11 case, regardless of whether a bankruptcy court determined that SBC would be adequately assured of payment for future services under Section 366 without a deposit from the customer. The proposed tariff revisions that include bankruptcy as a trigger for requiring a security deposit therefore are in conflict with bankruptcy law and should be rejected.

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[19] Caldor, 117 F.3d at 650 (emphasis in original; citations omitted).

[20] See Caldor at 2; In re WorldCom, Inc., et al., No. 02-13533 (AJG), slip op. at 3 (Bankr. S.D.N.Y. October 2, 2002); Adelphia Business Solutions, 280 B.R. at 68; In re Global Crossing Ltd., et al.; see also H.R. Rep., No. 95-595 at 350 (1977).

C. The Proposed Tariff Revisions Would Allow SBC to Discriminate Against Debtor Customers in Violation of Bankruptcy Law

Allowing SBC to use bankruptcy as a trigger for requiring security deposits would be inconsistent with the primary purpose of bankruptcy law, which is designed to afford a company a "breathing spell" to reorganize.[21] Application of SBC's proposed security deposit provisions essentially would constitute a penalty for filing for bankruptcy, which would frustrate the purpose of bankruptcy protection by saddling a company seeking to reorganize with an additional substantial expense. Moreover, the proposed tariff revisions, by their very nature, violate a basic tenet of the Code by allowing SBC to discriminate against a debtor who files for relief under the Code. The Code specifically protects a debtor from such discrimination.[22] Clearly, to the extent that the tariffs are contracts by which both parties must abide, the imposition of a deposit requirement triggered on the filing of a bankruptcy case or the financial condition of a debtor would be discriminatory and in violation of the Code.

Further, it must be remembered that SBC is in direct competition with many of its customers. SBC's "additional interest as competitors, and in eliminating unwanted competition, distinguishes them from the utilities in most other section 366 disputes, where the utility would benefit from the debtor's successful reorganization . . . ."[23] Thus, by asking for approval of tariffs that would unnecessarily restrict the liquidity and the

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[21] See, e.g., In re Ionosphere Clubs, Inc., 105 B.R. 773 (Bankr. S.D.N.Y. 1989) ("The purpose of the protection provided by Chapter 11 is to give the debtor a breathing spell, an opportunity to rehabilitate its business and to enable the debtors to generate revenue").

[22] See 11 U.S.C. § 365(e) (providing that "[n]otwithstanding a provision in an executory contract or unexpired lease, or in applicable law, any right or obligation under such contract or lease may not be terminated or modified at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on (A) the insolvency or financial condition of the debtor at any time before the closing of the case; (B) the commencement of a case under this title . . . .").

[23] Adelphia Business Solutions, 280 B.R. at 79-80.

ability of a competitor customer to reorganize under the Code, SBC actively is attempting to discriminate against temporarily financially disadvantaged customers in the hopes of eliminating unwanted competition.[24] The Division should not allow SBC to use its tariffs for this discriminatory, anti-competitive purpose, and should not allow SBC to use bankruptcy as a trigger for the requirement of security deposits.

[24] As discussed earlier, SBC's proposed tariff modifications would actually allow SBC to target its largest and most dangerous competitors under the cloak of managing its risk. See supra note 6.

III. CONCLUSION

Based on the foregoing, SBC should not be allowed to use its tariffs to make an end run around the jurisdiction of the bankruptcy court or discriminate against its competitor customers in violation of the Code. Therefore, at a minimum, SBC must be required to remove bankruptcy as a trigger for requiring security deposits. More importantly, the state of the telecommunications industry does not justify the unjust, unreasonable, and potentially discriminatory security deposit provisions which SBC proposes to include in its interstate access tariffs. Therefore, the Committee requests that the Division summarily reject SBC's proposed tariff revisions.

Respectfully submitted,

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF WORLDCOM, INC., ET AL.

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